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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL ANGEL CARDENAS,

Defendant and Appellant.

G045894

(Super. Ct. No. 09HF0516)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed as modified.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Alana Butler and Michael T. Murphy, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant Miguel Angel Cardenas of four counts of attempted premeditated murder (Pen. Code, §§ 664, subd. (a), 187; unless otherwise indicated, all further statutory references are to this code), two counts of active participation in a criminal street gang (§ 186.22, subd. (a)), one count of shooting at an inhabited dwelling house (§ 246), and one count of possession of marijuana for sale (Health & Saf. Code, § 11359). The jury also found that a principal in each of the attempted murder offenses had discharged a firearm (§ 12022.53, subds. (c), (e)(1) and that the attempted murders, shooting at an inhabited dwelling, and possession of marijuana for sale had been committed for the benefit of a criminal street gang.

The trial court sentenced defendant to four consecutive indeterminate life terms for the attempted murders, four consecutive determinate terms of 20 years for the firearm enhancement, a consecutive indeterminate life term for the shooting at an inhabited dwelling, plus a consecutive determinate term of 5 years for the possession of marijuana for sale and the accompanying street gang enhancement. The court specified that the minimum eligible parole date for the life terms was 15 years. As to the convictions for active participation in a criminal street gang, the court imposed and stayed punishment pursuant to section 654.

Defendant raises two issues on appeal. He contends three of the attempted murder convictions must be reversed because of incorrect jury instructions and the trial court erred by imposing 15-year minimum terms on the life terms imposed for the attempted premeditated murder convictions. The court adequately instructed the jury. The Attorney General agrees the court erred in sentencing and we concur. We therefore correct the sentencing error and affirm the judgment as modified.

FACTS

One evening, Gerardo Cruz, Steven Bolin, Thomas Gregory, and Dustin Cort were outside talking, with Gregory and Cort leaning against Bolin's parked car and Cruz and Bolin standing away from the vehicle facing the street. Cruz testified the four men were within five feet of each other.

A black Chevrolet Blazer driven by defendant approached. Cruz, who belonged to a street gang named F-Troop, recognized the Blazer as being associated with a rival criminal street gang named South Side Raza. The Blazer stopped next to Bolin's car and the passenger, later identified as Christopher Barron, stepped out of the vehicle. Barron asked the group, "Where are you from?" Gregory denied gang membership, but Cruz acknowledged associating with F-Troop.

Barron nodded his head, then pulled out a handgun, pointed it in Cruz's direction, and fired. Cruz and Cort dropped to the ground and began crawling for cover, Bolin fled, while Gregory ducked behind Bolin's car. Barron fired the gun at least five times. According to Gregory, "[a]fter [the gunman] had shot and [Cruz] dropped, [the gunman] went for every single one of us like this [moving his arm from left to right], chu, chu, chu, every direction." Barron then got back into the car, and defendant drove away. None of the victims were hit.

Eight days later, defendant participated in another shooting unrelated to the issues raised in this appeal.

DISCUSSION

1. There was no Error in the Jury Instruction

The four counts of attempted premeditated murder include one count for each of the four victims: Cruz, Bolin, Gregory, and Cort.

a. Background

The court's initial instruction to the jury included the portion of CALCRIM No. 600 declaring "[a] person may intend to kill a specific victim . . . and at the same time intend to kill everyone in a particular zone of harm or 'kill zone.'" But, at the prosecutor's request, the court named all four victims of the shooting as the gunman's primary target.

While deliberating, the jury asked for "the legal definition of Kill Zone or Zone of Harm." After discussing the matter with the parties, the court read to the jury a modified version of the attempted murder instruction and allowed counsel to reargue the issue. (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 127, 129 [trial court has "authority to give . . . modified version of . . . instruction during jury deliberations . . . upon learning of the jury's expression of confusion" so long as "the parties [are] given an opportunity to argue the theory"].)

The modified jury instruction stated in part: "A person may intend to kill a specific victim and at the same time intend to kill anyone in a particular zone of harm or kill zone. [¶] In order to convict the defendant of the attempted murder of Gerardo Cruz, Thomas Gregory, Dustin Cort or Steven Bolin, the People must prove that the defendant not only intended to kill Gerardo Cruz, but also either intended to kill Thomas Gregory, Dustin Cort or Steven Bolin or intended to kill anyone within the kill zone. [¶] . . . [¶] A person who primarily intends to kill one person may also concurrently intend to kill other persons within a particular zone of risk. This zone of risk is termed the kill zone. The intent is concurrent when the nature and the scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in the victim's vicinity. [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a kill zone or zone of risk, is an issue to be decided by you."

The prosecutor then argued there were “two separate ways” to return guilty verdicts on all four attempted murder charges. “First, . . . [d]isregard the kill zone[] and . . . ask yourself did the gunman have the intent to kill each and every one of the victims [¶] You can also get there by the kill zone theory. The . . . gunman’s primary target was Gerardo Cruz, but everyone else in the zone of harm or zone of risk is there. His intent to kill a human being then becomes concurrent as to them because of where they are.”

b. Analysis

Defendant argues the guilty verdicts as to Gregory, Cort, and Bolin must be reversed because the modified attempted murder instruction “allowed the jury to convict . . . if they found that Barron intended to kill Cruz, and everyone in an imaginary ‘kill zone,’ without finding that Gregory, Cort and/or Bolin were in that kill zone” Noting the guilty verdict on count 1, which concerned the attempted murder of Cruz, was signed the same day the jury asked the court to define the kill zone while the guilty verdicts for the other three victims were signed at a later date after the court gave the modified instruction, he claims the appellate record shows the jury relied on the kill zone theory to convict him of attempting to murder Gregory, Cort, and Bolin. He also contends “Gregory, Cort, and Bolin could have left the area well before the shooting,” and since the modified attempted murder instruction “did not require the jury to find that Gregory, Cort, and Bolin were in that kill zone,” it “allowed the jury to find [him] guilty of the attempted murder of [these victims] without finding that Barron had either an individual or concurrent intent to kill them” This claim lacks merit.

The portion of the modified instruction at issue in this case is derived from the Supreme Court’s decision in *People v. Bland* (2002) 28 Cal.4th 313, which held “[w]here the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant

intended that harm to all who are in the anticipated zone’ [Citation.]” (*Id.* at p. 330.) “[A]lthough the intent to kill a primary target does not *transfer* to a survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what i[s] termed the ‘kill zone.’ ‘The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim’s vicinity.’” (*Id.* at p. 329; see also *People v. Perez* (2010) 50 Cal.4th 222, 232 [“*Bland* . . . recognize[d] that a shooter may be convicted of multiple counts of attempted murder on a “kill zone” theory where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the “kill zone”) as the means of accomplishing the killing of that victim.”].)

To the extent defendant suggests the trial court erred by failing to adequately define what constituted the kill zone, we disagree. In the revised attempted murder instruction, the court explained the kill zone theory applied “*when the nature and the scope of the attack*, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in the victim’s vicinity.” (Italics added.) By relating it to “the nature and scope of the attack,” the instruction adequately described the zone of risk’s boundary. Gregory testified “[a]fter [the gunman] had shot and [Cruz] dropped, [the gunman] went for every single one of us like this [moving his arm from left to right], chu, chu, chu, every direction.” Thus, Barron’s act of firing one shot in the direction of Cruz and then several more shots while moving his aim from left to right could support a conclusion he intended to kill all four men.

Defendant’s claim Gregory, Cort, and Bolin had departed the zone of risk before the shooting began presented a question of fact for the jury to decide. The “‘concurrent intent’ or ‘kill zone’ theory ‘. . . is simply a reasonable inference the jury

may draw in a given case’ [Citation.]” (*People v. Stone* (2009) 46 Cal.4th 131, 137; see also *People v. Pham* (2011) 192 Cal.App.4th 552, 559 [“The question—which is a factual one for the jury to decide—is whether, based on the particular evidence in the case, it can be inferred that defendant had the concurrent intent to kill not only his intended target but others in the target’s vicinity”].) Again, the court’s revised instruction properly informed the jury “[w]hether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a kill zone or zone of risk, is an issue to be decided by you.”

The evidence at trial sufficed to support a finding all four victims were in the zone of risk. Cruz, Cort, and Gregory testified they and Bolin were standing within a few feet of each other when Barron displayed the gun and began shooting. All three witnesses claimed no one ducked or attempted to flee until after the first shot.

We conclude the jury was adequately instructed.

2. There was a Sentencing Error

The trial court ordered defendant to serve a minimum of 15 years on each attempted murder count before being eligible for parole. Section 3046, subdivision (a) provides: “No prisoner imprisoned under a life sentence may be paroled until he or she has served the greater of the following: [¶] (1) A term of at least seven calendar years. [¶] (2) A term as established pursuant to any other provision of law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole.” Section 186.22, subdivision (b)(5) provides for a 15-year minimum sentence where a crime is “punishable by imprisonment in the state prison for life” committed for the benefit of a criminal street gang.

But where the sentence for the attempted murder conviction is subject to a 20-year enhancement under section 12022.53, subdivision (c) (discharge of firearm), and defendant did not personally use or discharge the firearm, section 12022.53, subdivision

(e)(2) provides the 15-year minimum of section 186.22, subdivision (b)(5) shall not apply. (See *People v. Salas* (2001) 89 Cal.App.4th 1275, 1280-1282.) Thus, each of the life sentences is subject to a 7-year rather than a 15-year minimum. We order the sentence corrected accordingly.

DISPOSITION

The sentence is modified to delete the 15-year minimum parole eligibility requirement and to insert in its place the requirement that defendant's life sentences for each attempted murder conviction is subject to a 7-year minimum. (§ 3046, subd. (b).) The trial court is directed to prepare an amended abstract of judgment reflecting the modified sentence and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.